CF0000064217

(2)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR:M.P.

Criminal Appeal No. 1840 of 2000

Devanand Dubey, aged 41 years,
Son of Ramashankar Dubey,
Occupation: Non-Medical Assistant
Community Health Centre,
Masturi, Distt.Bilaspur, (M.P.).

.. APPELLANT
(In Jail)

VERSUS

State of Madhya Pradesh.

.. RESPONDENT

APPLICATION

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE.

(33) AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

D.B: HON'BLE SHRI L.C. BHADOO, J
HON'BLE SHRI SUNIL KUMAR SINHA, J

Criminal Appeal No.1840/2000

Devanand Dubey
Vs.
State of Madhya Pradesh
(now Chhattisgarh)

Criminal Appeal No.1679/2000

Daso alias Pramesh Dubey
Vs.
State of Madhya Pradesh
(now Chhattisgarh)

Judgment for consideration

Sd/-
Sunil Kumar Sinha
Judge

Hon'ble Shri Justice L.C. Bhadoo

Judge

Sd/-
L.C. Bhadoo
Judge

Post for Judgment: 22.02.2007

Sd/-
Sunil Kumar Sinha
Judge

(34) AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

DB: Hon'ble Shri L.C. Bhadoo, J
Hon'ble Shri Sunil Kumar Sinha, J

Criminal Appeal No.1840/2000

Devanand Dubey
Vs.
State of Madhya Pradesh
(now Chhattisgarh)

Criminal Appeal No.1679/2000

Daso alias Pramesh Dubey
Vs.
State of Madhya Pradesh
(now Chhattisgarh)

Appearance:

Shri Surendra Singh, Sr. Advocate with Shri N.K. Mehta, counsel for the appellants.

Shri U.N.S. Deo, and Shri Ashish Shukla, Addl. Public Prosecutors, for the State.

Dr.N.K. Shukla, Sr. Advocate with Shri A.K. Yadav, for the objector, wife of the deceased.

JUDGEMENT
(22.02.2007)

Per Sunil Kumar Sinha, J

(1) Since both these Criminal Appeals are arising out of judgment of conviction and order of sentence dated 21.6.2000 passed in Sessions Trial No.359/1998 by the First Additional Sessions Judge, Bilaspur, therefore, they are being disposed of by this common judgment.

(2) Criminal Appeal No.1840/2000 has been filed on behalf of accused appellant Devanand Dubey whereas Criminal Appeal

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No.1679/2000 has been filed on behalf of accused appellants Daso @ Pramesh and Dayanand Dubey. Daso @ Pramesh has been convicted u/ss 302 & 450 IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs.1000/-, in default of payment of fine to further undergo R.I. for 3 months and 7 years R.I., and fine of Rs.1000/-, in default of payment of fine to further undergo R.I. for 3 months respectively. His sentences have been directed to run concurrently. Appellants Devanand Dubey and Dayanand Dubey have been convicted u/s 302 read with section 34 of IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs.1000/- each, in default of payment of fine to further undergo R.I. for 3 months.

(3) The case of the prosecution is that the deceased Surendra Kumar Sharma was the tenant of one Jhumaklal Dubey and was holding the possession of his tenanted shop situated in Sarkanda, Bilaspur. Jhumaklal Dubey wanted to get his shop vacated and for this, requisite proceedings were filed in the Civil Court and thereafter, the appeal was filed in the High Court and the matter was decided in favour of the tenant Surendra Kumar Sharma (since deceased). On this ground the relations between the parties were inimical. The accused persons are the relations of landlord Jhumaklal. On 17.4.1998 at about 4.45 p.m., all the accused appellants entered into the tenanted premises of the deceased Surendra Kumar Sharma, accused appellant Daso @ Pramesh Dubey assaulted the deceased with a knife causing injuries on his vital parts. The allegations against two other accused persons are that they had exhorted the accused

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appellant Daso for committing murder of the deceased. The further case of the prosecution is that at that time, Arun Dubey (P.W.1), servant of the deceased and Smt.Pushpa Sharma, wife of the deceased and one Smt.Meena Sharma (P.W.4) had witnessed the incident. The incident was reported to the Police Station, Sarkanda on 17.4.1998 by Telephone, which was reduced into writing in *Rosnamcha Sanha* No.999 Ex.P-20. Receiving such information, the Town Inspector left for the scene of occurrence. The deceased was taken to the hospital where the Town Inspector asked him about the incident and recorded *Dehati Nalishi* Ex.P.22. This *Dehati Nalishi* was signed by Surendra Kumar Sharma, the deceased himself, based on which, the First Information Report was lodged under Ex.P-14. Requisition for medical examination of the victim was prepared and his injury report was obtained vide Ex.P-10. The 161 statement of Arun Kumar Dubey was also recorded. The blood stained clothes of the deceased i.e., full pant, shirt and underwear etc., were seized under Ex.P-3. The servant of the deceased namely Arun Kumar Dubey (P.W.1) was sent for medical examination under Ex.P-24 and his medical report Ex.P-19 was received. The samples of blood stains were taken from the chair in the shop under Ex.P-25. Site Plan was prepared under Ex.P-26. Accused appellant Daso @ Pramesh was taken into custody on 6.5.1998. His memorandum u/s 27 of the Evidence Act was recorded under Ex.P-4 regarding the weapon of offence and at his instance a *Khukhri* was recovered under Ex.P.5. Clothes of the accused Daso were also seized from

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his house under Ex.P-6. For further treatment, the deceased was referred from Govt. Hospital, Bilaspur to Bhilai Hospital, where he died during the course of treatment on 05.5.1998. A *merg* intimation in this regard was sent by the concerned Doctor of Bhilai Hospital to Police station Bhilai, Bhilainagar, under Ex.P.15, on which, the enquiry on *merg* was conducted by Police Station Bhilainagar. The concerned Police Officer of Bhilainagar, gave notice to the *Panchas* under Ex.P.12 on 5.5.1998. The inquest on the body of the deceased was prepared under Ex.P.13 on the same day and the dead body of the deceased was sent for postmortem under Ex.P.16. The post mortem was conducted by Dr. P.K. Agrawal and the report thereof was prepared vide Ex.P-21, bed head ticket of Bhilai hospital (Ex.P-2) was taken into possession and a seizure memo Ex.P.17 was prepared in this regard and the report regarding death of the deceased was recorded in Sarkanda Police Station, Bilaspur under Ex.P-32 on 27.5.1998. The Seized articles were sent for examination under Ex.P-31 and a report from Forensic Science Laboratory, Sagar, was received under Ex.P.34. The Statements of witnesses were recorded and after completion of the investigation, charge sheet was filed in the Court of Judicial Magistrate, First Class, Bilaspur, who in turn, committed the case to the Court of Sessions Judge, Bilaspur, from where the case was received on transfer by the First Addl. Sessions Judge, Bilaspur, who conducted the trial.

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(4) The prosecution, in order to prove its case, examined as many as 24 witnesses. Thereafter, the statements of accused persons were recorded u/s 313 Cr.P.C., in which they denied the material appearing against them. The learned Addl. Sessions Judge, after hearing the parties, convicted the appellants as aforementioned.

(5) Learned counsel for the appellants has not disputed the homicidal death of the deceased. More over, the medical report of the deceased which was prepared by Dr.G.P.Naidu (P.W.10) on 17.4.1998 would show that on the examination of the victim in the hospital at about 5.30 p.m., on the said date, he noticed the following injuries :-

(i) An incised wound on the right side of the chest at the position of 11th and 12th ribs

(ii) An incised wound on the forehead in size of 3" x 1 ½"

(iii) An incised wound on the back portion of left hand in size of 4" x ½"

(iv) An incised wound on the back portion of the head i.e., occipital region.

(v) An incised wound on the right cheek in size of 3" x ½" .

The Doctor opined that the injuries were caused by sharp edged weapon. His report is Ex.P.10. The Surgical Specialist, Dr.Rajeev Ratan Tiwari (P.W.16) also stated that the following injuries were noticed by him and an entry to this effect was made in the bed head ticket Ex.P-18 by his Junior, Dr.K.K. Sao.

(i) An incised wound at the right cheek in size of 3" x ½"

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(ii) An incised wound at the front portion of the stomach in size of 2" x ½"

(iii) One penetrating wound on the left side of the chest at the lower region in size of 2 ½" x 1"

(iv) An incised wound on the left hand in size of 4" x ½"

(v) An incised wound at the back portion of the head small size.

(vi) Another incised wound at the back portion of the head.

According to him, the patient was in serious condition, therefore, he had advised for immediate blood transfusion. The injuries were caused by sharp edged and pointed weapon. Apart from this, the post mortem report of the deceased, Ex.P.21, would show that the cause of death was septicemic shock and the duration was within 24 hours of the said examination, which was conducted by Dr.P.K. Agrawal (P.W.22) on 06.5.1998. In the said report also, the autopsy surgeon has recorded presence of as many as 6 external injuries and he has also recorded that the occipital, frontal and both parietal bones were fractured. He has noticed that the large intestine of the deceased was repaired and puss was present beneath the left ribs. All these reports are suggestive of the fact that the death of deceased was homicidal in nature.

(6) So far as the involvement of the accused appellants in crime in question is concerned, learned Senior Counsel has mainly argued that the over all case of the prosecution against the appellant Dayanand and Devanand is that they have come alongwith the main accused Daso @ Pramesh and they have been exhorting Daso to commit murder of the deceased and in

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this manner, they have shared their common intention in furtherance of which murder of the deceased was committed by Daso @ Pramesh, but the evidence regarding such exhortation is shaky and untrustworthy, therefore, the presence and exhortation, allegedly given by these two appellants, is doubtful and they be acquitted by giving benefit of doubt. So far as appellant Daso @ Pramesh is concerned, learned Senior Counsel argued that he has already been released on probation, therefore, there is no necessity of scrutinizing his case.

(7) Be that as it may, since we are scrutinizing the case of appellants Dayanand Dubey and Devanand Dubey, therefore, we also deem it appropriate to scrutinize the case of appellant Daso @ Pramesh.

(8) We have heard learned Senior Counsel for the appellants and learned Additional Public Prosecutors for the State assisted by learned Senior Advocate who has appeared on behalf of the Objector, wife of the deceased.

(9) The conviction of the appellants is based upon the evidence of eye-witnesses namely Arun Kumar Dubey (P.W.1), Smt. Pushpa Sharma (P.W.2), Smt. Meena Sharma (P.W.4), Gopal Singh (P.W.7) and Gopal Prasad Sahu (P.W.11) supported by the medical evidence and evidence of discovery and seizure of various articles at the instance of the accused Daso @ Pramesh.

(10) Arun Kumar Dubey (P.W.1) has stated that on the fateful day, he was present in the shop but the deceased Surendra Sharma was not in the shop. At that time, which was about 3 p.m., one tall man came to the shop and called Surendra

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Sharma. When Surendra Sharma came there, he talked with him regarding the shop. Thereafter, the tall man went back and he alongwith the deceased Surendra Sharma were sitting in the shop. After some time; the same person again came to the shop but at this time, he was holding some equipment with him and he assaulted the deceased with the said equipment. When he intervened he also received injury. Seeing all this, he had called the wife and maternal aunt of Surendra Sharma. Thereafter, people gathered there and they were saying that Daso had assaulted. He has further stated that since he had gone to call these persons he could not say where the other injuries were inflicted on the deceased, Surendra Sharma, after receiving the first injury. On the above statement of this witness he has been declared hostile by the prosecution and lengthy cross examination was done by the State Counsel, but nothing pertaining to the identity of the accused Daso @ Pramesh and the presence of other accused persons could be established by this witness. The trial Court has taken this view that this witness has only established that the other two witnesses namely Pushpa Sharma (P.W.2) and Meena Sharma (P.W.4) had also come to the spot and nothing more, which also appears to be reasonable to us. So far as appellants Dayanand and Devanand are concerned, this witness has stated vide para 6 of his cross examination by the State that he had told the name of Daso to the police while giving his statement, but he has denied the suggestion that at that time, he had also told the names of Devanand and Dayanand saying that they were standing at the

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doors and further that these two appellants, while standing on the doors, were not allowing the other persons to enter into the premises of the shop. However, as stated earlier, this witness has supported the prosecution case to this extent that while the deceased was being assaulted, the wife of the deceased namely Pushpa Sharma (P.W.2) and his maternal aunt Meena Sharma (P.W.4) had witnessed the said occurrence.

(11) Smt.Pushpa Sharma (P.W.2) has stated in her evidence that she knows the appellants as their shop was taken by them on rent. Her husband was a property dealer; their house is situated just adjacent to the said shop. Arun Dubey was servant in the shop. A dispute was going on regarding vacating the shop since last 10 years and they have won the case from the High Court. Prior to this incident, accused Dayanand and Devanand had once broke open the lock of the shop and the dispute has begun. The accused Dayanand and Devanand are uncles of accused Daso @ Pramesh. She further stated vide para 4 that on 17.4.1998 at about 3.45 - 4 p.m., her husband and brother in law Brajesh Sharma were sitting in the drawing room. At that time Arun Dubey (P.W.1) came and called her husband saying that Daso has come to the shop and he is calling him. On this, she, her husband and brother in law went to the shop where they saw Daso. Thereafter, there was some talk between Daso and Surendra Sharma about the shop. After some talks, it was said to the deceased by Daso that the shop belongs to his grand-father, the deceased should vacate it otherwise he will murder him. On all this, the deceased said

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that he is a tenant and he has won the case from the Court and he is also paying the rent. After giving such threatening, Daso went from there, thereafter, all of them returned back to the house and Brrijesh Sharma has returned to his own house. Just a few minutes thereafter, the maternal uncle Devendra Sharma and maternal aunt Meena Sharma (P.W.4) came to their house. After two minutes, Devendra Sharma has gone back and *Mami* Meena Sharma was sitting in the house. The deceased Surendra Sharma again went to the shop. After 10 minutes, the servant Arun Dubey (P.W.1) called them saying that Daso Dubey is assaulting Surendra Sharma (deceased). Hearing this, she alongwith her maternal aunt Meena Sharma (P.W.4) rushed to the shop. She saw that Daso Dubey was assaulting her husband and other two appellants namely Dayanand and Devanand were standing near the doors of the shop. Daso was having a long knife. This witness has stated about the assaults being given by Daso and she has also stated that at that time, these two appellants Dayanand and Devanand were giving exhortations for giving more beating. She has also stated that these two appellants had stopped them from entering into the shop. She has further stated that she requested Daso to leave her husband saying that she has small children and she will vacate the shop and she will also give the money whatever is required by them. She has stated about various assaults being given by the accused Daso to her husband. She has further stated that after giving such assault by Daso, all the appellants ran away from

the place of occurrence, thereafter, the injured was taken to the hospital.

(12) Similar evidence has been given by P.W.4 Meena Sharma. She has corroborated P.W.2 Pushpa Sharma by saying that on a call given by P.W.1 Arun Dubey, she had also gone to the shop alongwith P.W.2 Pushpa Sharma and she had seen the accused Daso armed with a long knife and had also seen that Daso was giving repeated blows to Surendra Sharma. She has also stated that at that time, appellants Dayanand and Devanand were standing at the door and they were not allowing them to enter inside the shop and were exhorting to give more blows to the deceased.

(13) P.W.7 Gopal Singh is the other eye-witness. He has stated that he does not know the accused persons or even the deceased but on the fateful day, when he was returning to his house he saw a mob in front of a shop. On this he went to the shop and saw that a stout man was assaulting a person with a Bujali like weapon. Two persons were standing at the Gate of the shop and they were trying to disperse the mob. The two persons, who were standing at the gate of the shop, were exhorting the third person saying "Daso kill Surendra Sharma". He further stated that these two persons asked the third person, who came from inside the shop, as to whether he (Daso) has killed the deceased or not? and if he is not killed, he should go and kill him. He stated that the stout man again entered into the shop and assaulted the deceased with the help of some sharp edged weapon.

(14) The other witness namely Gopal Prasad Sahu (P.W.11) has also stated in the similar fashion as P.W.7 Gopal Singh and has added that Daso assaulted Surendra Sharma with 12 feet long weapon. He has further said that after the assault, Daso fled from the place of occurrence on a Hero Puch two wheeler.

(15) If we look into the evidence of these witnesses, it would appear that the evidence of P.W.7 Gopal Singh and P.W.11 gopal Prasad Sahu are totally untrustworthy. They have developed a new story against the appellants. They have not supported the version of P.W.2 Pushpa Sharma and P.W.4 Meena Sharma. Another reason for disbelieving the testimony of these witnesses are that according to P.W.7 Gopal Singh, his police statement was recorded after a month on 21st or 22nd day which would fall on 21st or 22nd of May 1998. Likewise, the police statement of P.W.11 Gopal Prasad Sahu was recorded on 2.6.1998 and such belated statements, which are completely giving a new dimension to the prosecution case and are giving altogether new version cannot be relied on. There was no reason with these witnesses not to disclose the story at some early stage and to keep quiet for such a long period. It is for these reasons; we do not place our reliance on the testimony of these witnesses.

(16) So far as evidence of P.W.2 Pushpa and P.W.4 Meena is concerned, learned Senior Counsel argued that the version of these two witnesses to the extent that they had seen the appellants Dayanand and Devanand exhorting the main accused to assault the deceased Surendra Sharma cannot be relied on. The reason being that their such evidence are exaggerations and

are omissions in their police statements recorded under Ex.D-1 and D-3. Not only this, the factum of exhortation by these appellants is also not there in the *Dehati Nalishi* Ex.P-22 recorded by the Town Inspector on the information given by the deceased himself on the fateful day itself. In this regard, he refers to a judgment of the Apex Court rendered in the matter of ***Jainul Haque –Vs- State of Bihar, AIR 1974 S.C. Page 45***. It has been held by the Apex Court in the said judgment, vide para 8, that the evidence of exhortation is, in the very nature of things, a weak piece of evidence. There is quite often a tendency to implicate some person in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant. The Apex Court further held that the evidence adduced at the trial in respect of the part alleged to have been played by the appellant is contradictory and far from convincing and on that the conviction of the appellant was set aside and he was acquitted.

(17) In the case on hand also, so far as evidence in relation exhortation is concerned, admittedly that is an exaggeration made on the part of these two witnesses namely P.W.2 Pushpa Sharma and P.W.4 Meena Sharma. If we look into their 161 statements which have been marked as Ex.D-1 and D-3, it would appear that they have only stated that these appellants Dayanand and Devanand were present at the place of

occurrence and the deceased was assaulted by the main accused Daso and these two appellants had entered into the premises of the shop alongwith main accused Daso. As stated above, the exhortation parts are also not there in the *Dehati Nalishi* which was recorded by the Town Inspector under Ex.P-22 on the information given by the deceased. This *Dehati Nalishi* was signed by the deceased himself. It only comes in the *Dehati Nalishi* that these two appellants had also accompanied the accused Daso while he entered into his shop. Therefore, the story of exhortation to assault the deceased which has been developed by these two witnesses i.e., P.W.2 and P.W.4 is apparently an exaggeration and we are of the considered opinion that their version to the effect that these two appellants i.e., Dayanand and Devanand have exhorted the main accused to assault the deceased, cannot be relied on.

(18) Now the question arises about the conviction of these appellants with the aid of section 34 of IPC. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the

circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. The existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision. ***Please see Anil Sharma and others -Vs- State of Jharkhand (2004) 5 SCC 679***. The Apex Court further clarified that in 1870, Section 34 was amended by insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each", so as to make the object of section 34 clear. The section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading

to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under section 302 read with section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them.

(19) It was further held by the Apex court in the matter of ***Dani Singh –Vs- State of Bihar, 2005 SCC (Cri) 127 (para 20)*** that to constitute common intention, it is necessary that intention of each one of the accused be known to the rest and shared by them. Undoubtedly, it is difficult to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. But however difficult may be the task, the prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered. In most cases, it has to be inferred from the act, conduct or other relevant circumstances of the case in hand. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused had a common intention to commit offence for which they can be convicted. The facts and circumstances of cases vary and each case has to be decided keeping in view the facts involved. Whether an act is in

furtherance of the common intention is an incident of fact and not of law.

(20) Therefore, it is clear that a person merely because he was present at or near the scene without doing anything more, without even carrying a weapon and without even marching alongwith the other assailants could not be convicted with the aid of section 34 IPC for the offence committed by the other accused.

(21) Learned Senior Counsel referred to the decision of the Supreme Court in the matter of ***State of Orissa –vs- Arjun Das Agrawal and another, AIR 1999 S.C. 3229*** and argued that in the said case, the common object of the accused was gathered by the Supreme Court in the circumstance, when the accused had gone to the scene of occurrence along-with the other accused persons where co-accused gave knife blows to the deceased and the accused prevented wife of deceased to rescue her husband and pushed her away as a result of which she fell down, the eye-witness also stated that the accused held the beard of deceased and in such a situation the accused was liable to be convicted u/s 302/34 IPC having actively participated in criminal act of giving fatal blows to deceased in furtherance of common object namely to cause death of deceased.

(22) In the case on hand, though it comes in the evidence of P.W.2 Pushpa Sharma, wife of the deceased and P.W.4 Meena Sharma, the maternal aunt of the deceased, that when they had reached to the spot they were prevented by these appellants from entering into the shop. But this evidence of these two

witnesses is lacking in their police statements i.e., Ex.D-1 and D-3 respectively. It is also important to mention that it is nobody's case that the deceased became unconscious immediately and he could not witness the occurrence. In this case, the deceased himself had witnessed the occurrence and the statement of the deceased in the form of *Dehati Nalishi* was recorded vide Ex.P.22 by the Town Inspector and the deceased himself has not made these assertions that when his wife and maternal aunt had tried to rescue him, they were prevented by these two appellants Dayanand and Devanand. He has only stated that these two appellants were also present when the assault was given by the accused appellant Daso. Another important factor is that in 161 statements of P.W.2 and P.W.4, they have made a different kind of allegations as they have said that when they had tried to rescue the deceased, the accused appellant Daso threatened them for not doing so pointing out the knife towards them. In this manner, it is apparent that by the evidence of these two witnesses i.e., P.W.2 Pushpa Sharma and P.W.4 Meena Sharma and further from the contents of the *Dehati Nalishi* which is the first hand information to the police from the mouth of the deceased himself, it is clear that merely presenee of these appellants at the place of occurrence is established in this case and nothing more than that. Can they be punished only on account of their presence at the scene of occurrence ? The reply to the said question, in light of the above decisions of the Apex Court, would be negative because in that case, the factum of element of participation in action would

always be lacking as no overt act is attributed to them. The story set forth by the prosecution witnesses Pushpa Sharma (P.W.2) and Meena Sharma (P.W.4) regarding the exhortation to assault the deceased and also regarding preventing them from rescuing deceased is not established beyond all reasonable doubts as the same is a material exaggeration in the evidence of these witnesses.

(23) Learned counsel for the State Respondent as well as learned counsel for the objector argued that it comes in the evidence of the witnesses that all the accused persons ran away from the place of occurrence after the commission of offence which shows that they had come together and had gone together and an inference of common object and common intention may be drawn. This argument cannot be accepted in view of the evidence of P.W.11 Gopal Prasad Sahu who has stated that after commission of offence, accused Daso fled from the scene on a Hero Puch Bike. More over, P.W.2 has only stated that after commission of the offence, all the 3 accused persons ran away from the spot but she has never said that they went together so as to constitute an element of their common intention and to show that after fulfillment of their common object they ran away together. It is a natural conduct and phenomenon that when such things happen in a dense locality the persons of the locality, particularly the known persons of the assailant, run away from the place of occurrence with an intention to avoid the evil consequences. Merely on this evidence that these accused persons also ran away from the place of occurrence they cannot

be connected with the commission of crime. Therefore, we are of the considered opinion that the conviction of these appellants, Dayanand and Devanand, with the aid of section 34 IPC cannot be sustained in view of the above discussion and that has to be set aside.

(24) In the result, we allow the appeal of Devanand Dubey filed as Criminal Appeal No.1840/2000. The conviction and sentence awarded to him are set aside. He is acquitted of the charges framed against him. It is stated that he is on bail. His bail bonds are discharged. The appeal of accused appellant Dayanand also succeeds and his conviction and sentence are also set aside. He is also acquitted of the charges framed against him. His bail bonds are also discharged. However, the appeal of Daso @ Pramesh Dubey is dismissed and his conviction and sentence, awarded by the court below, are maintained. Criminal Appeal No.1840/2000 is allowed in full and Criminal Appeal no.1679/2000 is allowed in part.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Sunil Kumar Sinha
Judge

Rao